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## "Sittlichkeit" --- Higher Than Written Law

An address by David L. Withington at the annual banquet of the  
Bar Association of the Hawaiian Islands, November 8, 1913.

Two unusual incidents, illustrating habits of thought having no relation to the rules laid down for conduct either by law or ethics which illustrate the powerful and subtle forces dominating human affairs and which must be reckoned with in judging or forecasting human conduct, have recently come to my notice. They illustrate also the influence of race ideals and environment as affecting conduct.

In one instance a Japanese, educated in America, graduate of one of her theological schools, and professor in a great Christian institution in Japan, wrote to his wife—also highly educated and a teacher in America, where she was living with perfect propriety and supporting an only daughter—that either he or she must get a divorce in order to save his reputation. Even in this decadent age in America, where divorce is the solvent for the lightest of marital ills, it is not thought necessary to obtain a divorce in order to preserve the reputation of a husband whose wife is in a different country pursuing a profession for which she had been particularly educated, and living, as is conceded, with perfect propriety. It is a happy omen that even now the divorce would be more injurious to the reputation of the parties than living apart under such circumstances. The gentleman who told me of this incident, himself for a generation a resident of Japan, a learned man and a student of the Japanese people, confessed that he could not understand how it could preserve the professor's reputation to obtain a divorce, but did not deny the fact. You may search in vain in the laws or the defined ethical standards of Japan for anything to sustain the concept. One has to go to what Professor Sumner in his book calls "Folkways," which Cicero apostrophized in his famous oration against Cato, line under the term of Mores, which the Germans call Sittlichkeit and which Lord Chancellor Haldane in his great address at Montreal before the American Bar Association seized upon this German word, translates into English thought as "Good Form."

The other incident which illustrates the influence of environment on good form is a recent jury case, in which an exceptionally intelligent white jury had to pass on the claim of an elderly Hawaiian against the estate of his mistress for money advanced for building a house for her, and for the taxes, water rates and other expenditures in maintaining it. The man at the beginning of the episode was in middle life; the woman very young; the result a legal separation between the man and his wife, he living in the house which he built for his mistress, undoubtedly expecting the mistress would survive, and that he would live there the rest of his life. Unexpectedly, the mistress died and the claim was turned out of doors. The jury, without a moment's hesitation, came to the conclusion that he had no legal claim, but with very little more hesitation decided that under the circumstances they would give him what they called dower—meaning courtesy—in the house, and divided the value of the house in three parts, and rendered a verdict giving him one part accordingly. There was certainly nothing either in written or judgements law, or in any standard of ethics under which the jury had been educated, to justify the verdict. But it is not "Good Form" in this environment for the heirs to throw out the claimant, who had built the house and maintained it, because of the accident of death, without making some provision for him.

I have related these cases as a curtain-raiser to my main piece, which itself will be but a skit, to wit, a description of the opening day of the American Bar Association at Montreal September 1 of this year.

Montreal is an interesting and noble city. There is a public park on the top of the mountain, reached either by a winding carriage road or by an inclined railway, with a panoramic view of the city and of the waters of the broad St. Lawrence; a city divided against itself bi-lingual—half Scotch, half French—and with its double set of customs and ideals well typified, on the one hand by the numerous and stately convents, whose beautiful grounds, spread out on the side of the mountain, are a delight to the eye, and on the other by the equally beautiful buildings and grounds of the Protestant McGill university, largely the gift of two Scotchmen, Lord Strathcona and Sir William Campbell. These are the divisions in the new Montreal. If we go to the old city, then one sees the great Catholic churches and cathedrals, chiefest of which is Notre Dame, ornate in color and sculpture, while on the other hand the great Protestant churches form an agreeable contrast by their very simplicity.

The week preliminary to the meeting of the Bar Association was spent in the work of the commission on uniform legislation. The subjects engrossed the attention of that body. The first, an attempt to amend the uniform negotiable instrument act along lines suggested by the late Dean Ames at the time of the adoption of the act, when I was a member of the commission from California, the attack now being led by Professor Williston of Harvard. I found myself arrayed against Williston, as I formerly had been against Ames, and the effort was defeated by a decisive vote largely on the argument advanced by ex-Solicitor-General Lyman, a member of the commission from Missouri, who concluded the debate, pronouncing the changes proposed as trivial and citing one instance which he said was a question of English between Massachusetts and Hawaii, in which it seemed to him that Captain Cook had the better of John Harvard.

A uniform law of partnership presented by Dean William Draper Lewis of the law school of the University of Pennsylvania was badly riddled and

sent to the dock for repairs, while the report on a workman's compensation act was licked into shape and though not formally adopted, left in a satisfactory condition and the conference tentatively adopting both a compulsory and an optional law. The chairman of the committee, Mr. Bailey of Massachusetts, wanted to make the compulsory law the fulmination of an unconstitutional and so-called progressive declaration, rather than the recommendation of a law both constitutional and workable. I have spent too much time on this conference and turn to the American Bar Association.

It was the first time the association had ever met outside of the limits of the United States. A great English jurist had before this delivered the address—Lord Russell of Kilowen, chief justice of England, but it was the first time that the lord chancellor had crossed the seas for that purpose. To do this he had to obtain the royal permission and to have the seal temporarily placed in commission. The king for a time was without the keeper of his conscience, but substitutes could still affix the seal to the great acts of the kingdom.

The Princess theater, at which the afternoon meeting was held, was packed to the doors. Being a member of the general council, I had an opportunity to sit on the platform, which I did not avail myself of, there being so many distinguished guests that I knew it would be crowded, and as a matter of fact some had to stand. I regretted not going on the platform for Lord Haldane had a poor voice and it was difficult to follow his address. I had as a recompense good company, the next seat being occupied by Judge Cornish of the supreme court of Maine. It was not Maine and California, but Maine and Hawaii that met, and it is one of the pleasures of these meetings that they bring in contact men from the most remote parts of the country.

Mr. Kellogg of St. Paul, the president, is a very able lawyer of remarkable energy and power of work, who has been conducting for the government some of the large trust cases, but in his address which had been delivered in the morning, I missed the culture, the eloquence and the grace of his former partner, Cushman K. Davis. On the other hand, no one had any reason to be ashamed of the comparison between the presiding officer of the afternoon and the distinguished foreign guests. The wonderful personality, great learning and happy wit of Chief Justice White never shone to better advantage.

Lord Haldane, in his opening address, said he brought a message from King George across the sea to people of a kindred race and tongue, and that there was that the people of Great Britain, of the United States, of Canada, and to a large degree of Germany, have the same habits of thought, same point of view, the same tradition, which permeates and colors their written laws and their judicial decision, that international questions should be easier of solution where the standpoints of the people involved are the same, and the appeal to arms became relatively unnecessary. He instanced the unguarded frontier between Canada and the United States as an evidence of the possibility of nations living in close contact with each other without the necessity of armaments, provided there are common notions of conduct. This, he said, he was authorized by the British Government to make as a formal declaration to the people of the United States. To describe what he meant he appropriated a German word, "Sittlichkeit," and translated it into English as "good form."

As I listened I thought to myself that the social life surrounding was an evidence that the doctrine is not limited merely to those nations which have similar notions of good form. The double life in the province French and English, seemed to me to go on with comparatively little jar, notwithstanding the different notions of conduct, for by their very contact, a new convention had been formed, with new ideas, a composite of the two, under which a fairly satisfactory and healthy life had arisen each race respected the notions and ideas of the other race and thus by concession arrived at a common standard of action.

I reflected again on the more stupendous problem with which we are so familiar—the acceptance by the hermit nation of Japan and by the self-satisfied, tolerant and highly trained Chinese nation of Western mores, and to a greater or less extent abandonment of their own mores, which we, in our narrowness and ignorance, attribute to an admission of the superiority of our concepts and habits of thought. I have never felt smaller or less proud of my race than at a banquet given at the Young by Mr. Breckons half a dozen years ago, at which were gathered the warring factions of the Chinese in this community. The then consul, Chang Tso Pan, said to them in substance: "I am a Confucian, but I have been reading the Words of Jesus, and the fundamental morality does not differ from that taught by Confucius. You gentlemen call yourself patriots. Now, if you wish to be true patriots, the best way to do so is to obey the laws of this country, in the spirit of those laws, and not try to carry into this country and enforce your own ideas and customs."

We insist on carrying our mores into China. We set up our own courts, and insist on being judged by our own standards.

I venture an incursion into Professor Sumner's work: "The great field for the use of the devices and apparatus of suggestion at the present time is politics. Within 50 years all states have become largely popular. Suggestion is easy

when it falls in with popular ideas, the pet notions of groups of people, the popular commonplaces, and the current habits of thought and feeling. Newspapers, popular literature, and popular oratory show the effort to operate suggestion along these lines. They rarely correct; they usually flatter the accepted notions. The art of adroit suggestion is one of the great arts of politics. Anthony's speech over the body of Caesar is a classical example of it." (Page 23.)

He further says that "criticism is the operation by which suggestion is limited and corrected," and again, "the supreme criticism is criticism of one's self."

"World-philosophy, life-policy, right, rights and morality are all products of the folkways. They are reflections on, and generalizations from, the experience of pleasure and pain, which is won in efforts to carry on the struggle for existence under actual life conditions. The generalizations are very crude and vague in their germinal forms. They are all embodied in folklore, and all our philosophy and science have been developed out of them." (Page 29.)

"The man on the mode is the 'common man,' the 'average man,' or the 'man in the street.' Between him and the democratic political institutions—the pulpit, the newspapers and the public library—there is a constant reaction by which mores are modified and preserved. The aim of all the institutions and literature in a modern state is to please him. His aim is 'to get out of them what suits him.' The yellow newspapers thrive and displace all the others because he likes them. The trashy novels pay well because his wife and daughters like them. The advertisements in the popular magazines are addressed to him. They show what he wants. The 'funny items' are adjusted to his sense of humor. Hence all these things are symptoms. They show what he believes in, and they strengthen his prejudices. If all art, literature, legislation and political power are to be cast at his feet, it makes some difference who and what is. His notion of society determines the mores of the whole." (Pages 50, 51.)

But, says Sumner, as the mores determine the degree of reserved, common sense, and the habit of observing measure and method, to which masses have been accustomed, "it follows that popular agitation is a desperate and doubtful method."

"If there is any document of Americanism, it is the Declaration of Independence. Those who have Americanism especially in charge have repudiated the doctrine that 'governments derive their just powers from the consent of the governed,' because it stood in the way of what they wanted to do. They denounce those who cling to the doctrine of Americanism, then we ask what Americanism and patriotism are. They are duty laid upon us all to applaud, follow, and obey whatever a ruling clique of newspapers and politicians chooses to say or wants to do." (Page 177.)

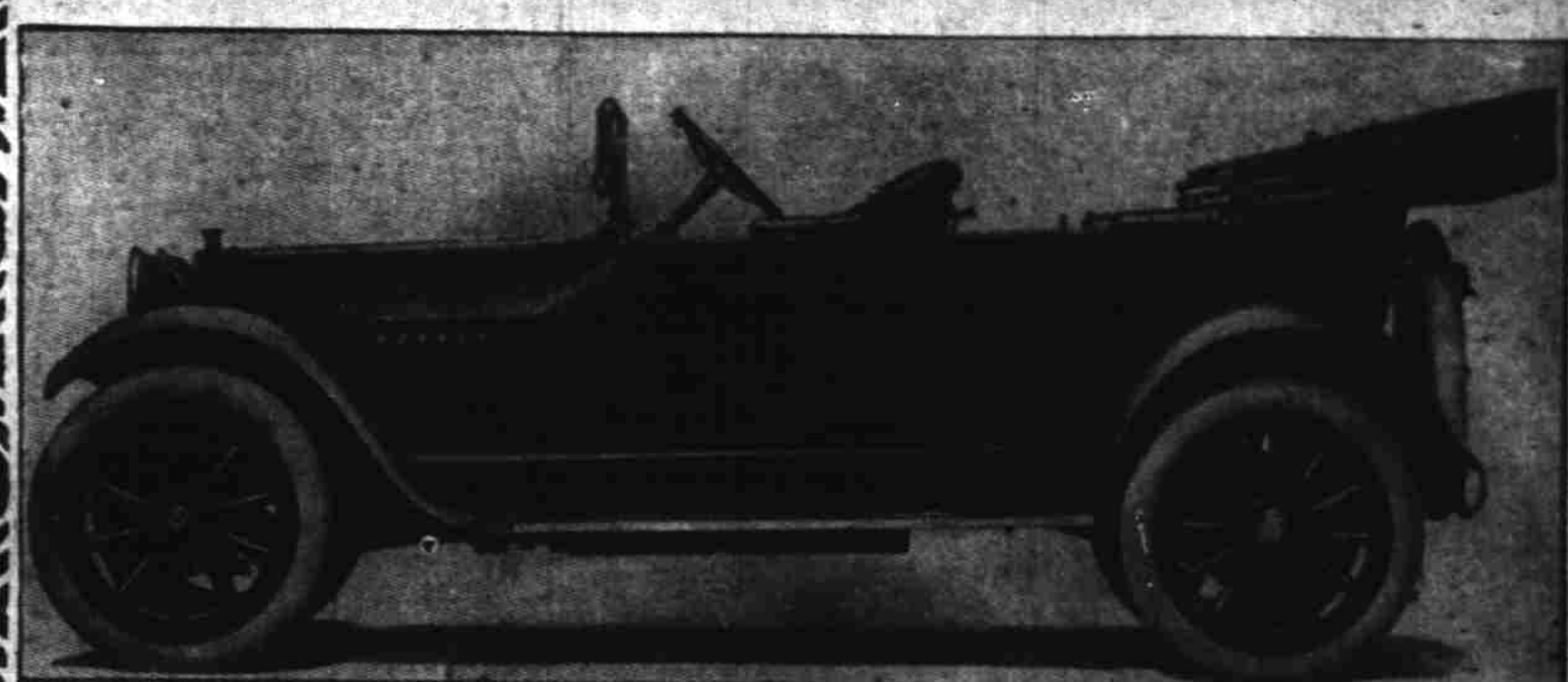
Professor Sumner reviews Rudick's comparatively recent work on Sittlichkeit in Germany, the work from which undoubtedly Lord Haldane largely drew his inspiration, in which Rudick deplores the lack of moral initiative and moral consciousness in the German people, and the indifference with which they allow all kinds of mores to be forced on them by economic and political arrangements. Sumner says, if this is true, "they are to be congratulated, for they have kept out one great influx of subjective and dogmatic mischief. Other nations have a 'nonconformist conscience' or a party of 'great moral ideas,' which can be caught by a phrase, or stamped by a catching watchword with a 'moral' suggestion."

I close with the most remarkable exhibition of one form of mores that I have ever seen, save at the quarter millennium at Harvard in 1885—the conferring of honorary degrees on the distinguished guests by McGill university. As one entered the great hall and saw in the background of the stage the portrait of its chancellor and founder, Lord Strathcona, the oldest Canadian Bay pioneer, and then saw the man himself, 93 years old, sitting in the chair in his doctor's robes, having crossed the sea to be present at the ceremony, the greatness of the occasion impressed itself. The conferring of the degrees, with the speeches of the sponsors, was sustained to a high key throughout. Maitre Labori and Senator Root were unavoidably absent, although the great French advocate was present in Montreal to attend the meeting and the degree was conferred in absentia. Each distinguished recipient took the hand of the lord chancellor and bowed before him; but Chief Justice White, a Catholic in their stronghold of Canadian Protestantism, graciously kissed the hand conferring the degree.

An unusual incident followed. Lord Haldane, Chief Justice White and Prime Minister Borden all spoke, and ex-president Taft was called following Borden, who had risen to power by defeating Taft's reciprocity treaty. Taft excused himself on the ground that he was to be the principal speaker the next day. Then when Joe Choate was called, the leader of the American bar jauntily walked down to the front of the stage and said: "You know, I am used to this thing." At which every one laughed, for Choate holds more than a score of honorary degrees. "But," he continued, "up to this time they have been conferred in silentia," and sat down.

I have overrun my time and violated the "mores" of our association.

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